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Supreme Court of the United States

OCTOBER TERM, 1917,

No. [redacted]227

BALL ENGINEERING COMPANY,
Petitioner,

against

J. G. WHITE & COMPANY, a Corporation,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER

HOMER S. CUMMINGS,
Attorney for Petitioner,
Ball Engineering Company.

Supreme Court of the United States

OCTOBER TERM, 1917, No. 589.

BALL ENGINEERING COMPANY,
Petitioner,

against

J. G. WHITE & COMPANY,
a corporation,
Respondent.

Reply Brief on Behalf of Petitioner.

The petitioner in this reply brief does not seek to add to the argument set forth in the brief accompanying its petition, but desires only to correct some of the statements made in the brief filed by the respondent.

I.

The respondent's brief devotes seven pages to a discussion of the case of *United States* v. *Societe Anonyme Des Anciens Etablissements Cail,* 224 U. S., 309, in which a claim was allowed against the Government for royalties on a patented invention for use on large guns, on the theory that there was an implied contract between the claimant and the Government. We regret to have to point out that the respondent's brief gives an entirely misleading conception of the facts of that case by setting forth verbatim, at page 17, the

letter dated September 3, 1891, from Admiral Ramsay to the Secretary of State, without quoting the letters of the Chief of the Bureau of Ordnance and of the Secretary of the Navy in December, 1894, which superseded the earlier letter and constituted a reversal of the position of the Government with respect to the rights of the claimants, the *Societe Anonyme*. The stress which the respondent's brief places upon the letter of September 3, 1891, is inexplicable in view of the fact (not alluded to in respondent's brief) that this Court, in its opinion in the *Societe Anonyme* case, expressly stated, with reference to that letter:

> "*But the position taken in that letter was, as we have seen, abandoned*, and it was declared that so far as the De Bange patent was valid, its claim for royalties was, in the opinion of the Bureau of Ordnance, a proper one, and would be sustained by the courts. *This was in 1894.* Prior to that time and afterwards the government continued to use the device. We think the court of claims had jurisdiction." (Our italics.)
>
> *United States* v. *Societe Anonyme Des Anciens Etablissements Cail*, 224 U. S., 309, at p. 322.

In the case at bar the findings of the trial court disclose a situation differing so widely from that shown by the entire opinion of this Court in the *Societe Anonyme* case, that it seems sufficient to point out that in the case at bar it is undisputed that the Government deliberately and unequivocally took the position that it had the right to seize the petitioner's property without payment

or compensation to the petitioner. (See quotations and references to record at pp. 21-22 of petitioner's brief attached to petition for certiorari herein.) In the *Societe Anonyme* case, on the contrary, the facts were, as stated by this Court in its opinion:

> "The officers of the government knew of the De Bange invention and were aware of its great importance and the purpose to deliberately take property of *another* without the intention that *he* should be compensated—in other words, to do plainly a wrongful act—cannot be imputed to them without the most convincing proof. Such proof does not exist in the present case. *On the contrary, the record shows that compensation was contemplated.* There was doubt as to the extent of it, because there was doubt as to how far the devices used were attributable to or belonged to De Bange, or whether they constituted an infringement of his patent, and *therefore there was hesitancy and doubt, not as to compensation, but as to the amount and extent of it.*" (Our italics.)
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> *United States* v. *Societe Anonyme, Etc., Cail*, 224 U. S., 309, at p. 320.

II.

The claim advanced in the respondent's brief, that the facts of the *Buffalo Pitts* case are analogous to those of the case at bar, is also without foundation. This Court in its opinion in the *Buffalo Pitts* case based its decision that the taking of the property in that case by the Gov-

ernment was upon an implied contract to pay the owner therefor, expressly upon the ground that the findings of fact of the trial court, which were conclusive upon this Court, established that the Government did not at the time of the taking dispute the plaintiff's right to compensation, but that, on the contrary, the Government officer agreed that if the property was left in the Government's possession he would recommend that payment be made to the plaintiff for its use, and that the plaintiff left the property with the Government, relying upon such representation and upon fact that its title was not disputed and with expectation that compensation would be paid. That this was the basis of the affirmance by this Court appears clearly from the following excerpts from its opinion in which it quoted verbatim findings X and XI of the trial court in that case:

> "The question in this case is, did these facts warrant the deduction that the government was liable upon an implied contract to pay for the use of the engine? In cases brought under this act coming up from a district or circuit court of the United States, the findings of fact of the trial court are conclusive, and the question is whether the conclusions of law were warranted by the facts found (citing cases).
>
> "We think the circuit court and the circuit court of appeals were right in concluding that, under the facts found, the United States was liable upon an implied contract. As to the plaintiff, it is specifically found that it left the property with the defendant, relying upon the fact that its title to the property under the mortgage was not disputed, and upon the representations made to it, and consented to

> the defendant's retaining possession of the property in expectation of receiving compensation for it; as to the government, it is found that it was well known to it that the chattel mortgage existed, and its validity was undisputed, and that it would continue the use of the engine and appurtenances, and, if left in its possession, payment would be recommended for such use.
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> * * * * * * *
>
> "While the government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation."
>
> *United States* v. *Buffalo Pitts Co.*, 234 U. S., 228, at pp. 232-235.

This should be compared with the facts in the case at bar, which are that, contemporaneously with the taking of its property, the petitioner objected both to the Government and to the respondent against its use (Finding 16, Defendant's Exhibits 1 and 2, made part of Finding by reference, fols. 88-89; 286-290), and never in any way consented or waived its rights; that the Government ignored the petitioner's claim and took the position that it had the right to use the petitioner's property under the contract between the Government and the Hubbard Building & Realty Company (Findings 17, 18, 19, fols. 90-93), and that the Government further claimed to have the right to use petitioner's property without paying the petitioner and without *paying* the actual value to anyone, but merely upon crediting to the Hubbard Building & Realty Company the *value of the property as fixed by an officer of the Government at a*

figure now determined to be $3,500 less than its actual value, as an off-set against the indebtedness of the Hubbard Building & Realty Company to the Government. (Findings 26, 32, fols. 98-103.)

We submit that the opinion of this Court in the *Buffalo Pitts* case clearly indicates that it would have reversed the judgment in that case if the findings of the Court below in that case had established, as they do in the case at bar, that the owner of the property did not consent to the use of its property on a promise of compensation from the Government, but objected to its property being taken or used, and that the Government did not admit the owner's right to compensation, but denied it, and claimed a right to use the property without payment to the owner, by virtue of an alleged right claimed to exist under a contract between the Government and a third person.

III.

The respondent's brief evidently seeks to create the impression that the petitioner or its predecessor in title, Mr. Ball, had a financial interest in the Hubbard Building & Realty Company, the contractor, or that there was some identity or community of interest between the petitioner and the Hubbard Building & Realty Company which might create a situation under which, according to the respondent's theory, no injustice would be done if it were held that petitioner was bound by the terms of the Hubbard Building & Realty Company contract and could be deprived of property

without compensation. A large part of the respondent's brief is devoted to paraphrases from the findings and to argument which has no apparent purpose except in so far as it is intended to give rise to such an impression. In fact, the respondent's brief goes so far as to make a statement which is clearly intended to refer to the petitioner and Mr. Ball, to the effect that they were "interested in the contracting corporation, but not appearing of record as owners thereof" (Respondent's brief, p. 24; see also p. 25). At page 28 the brief states that "the reading of the record must convince any impartial mind that Ball was the controlling influence in the Hubbard Company."

The fact is that the respondent had an opportunity to litigate this entire subject thoroughly upon the trial, with the result that *not only did the Committee fail to make any finding that either Ball or the petitioner had the slightest interest in the Hubbard Building & Realty Company, but the Committee even refused to find that either the petitioner or Ball had knowledge of or was constructively or otherwise put upon notice of the provisions of the contract between the Hubbard Building & Realty Company and the Government.*

It is noteworthy that all of the Courts before whom this litigation has come are in harmony on the one proposition that the petitioner's rights to its property were not subject to the terms of the contract between the Government and the Hubbard Building & Realty Company (Report of Committee, fols. 104-107; see opinion of Circuit Court of Appeals annexed to petition and brief on this application for certiorari as Schedule A, at bottom of page 42; *J. G. White & Company* v. *Ball Engineering Company*, 139 C. C. A., 164, 223 Fed., 618).

On the other hand, the findings expressly hold that the respondent agreed with the Government that the risk of taking and using the petitioner's property was to be solely upon the respondent and that the respondent was notified by the petitioner before and at the time of the taking that the petitioner objected and would insist upon payment from the respondent for the taking of the property (Record, p. 101; Report of Committee, fol. 87, also pp. 30-31, 79-80, 96-97). It also appears that the respondent had negotiated with the petitioner for the purchase or rental of the property and had failed to reach an agreement (Report of Committee, fols. 88-89).

The motive forming the background for the entire episode is succinctly stated at pages 11-13 of the brief filed on behalf of the United States on the present motion.

As has been held by every Court in this case, there is not the slightest reason weighing against the right of the petitioner herein to recover the value of its property from respondent, unless it be held as a legal proposition that the Government took the property in its sovereign capacity and thereby acquired title.

IV.

The respondent has annexed to its brief, as an exhibit, what purports to be a copy of a petition filed by the petitioner in the Court of Claims on May 27, 1916, alleging a claim against the Government for the value of the property seized on the theory that it was taken by the Government

in its sovereign capacity. The date of that claim is a year after the decision of the Circuit Court of Appeal reversing the first judgment and several months subsequent to the date of the second report of the committee, which is dated April 26, 1916 (fols. 108). It is apparent that the claim was filed for the purpose of protecting the claimant against the running of the six-year statute of limitations, in the event that it should be finally held in the present suit that the taking by the Government was as sovereign. In view of the opinion which was rendered herein by the Circuit Court of Appeals in April, 1915 (copy of which opinion is annexed to the petition and brief for certiorari as Schedule A, pp. 40-44), expressly holding that the property was taken by the Government as sovereign, it was highly proper for counsel for the petitioner to file such a claim as a precautionary measure. Nor did the filing of such a claim preclude the petitioner from continuing to maintain the position which it has insisted on throughout the present litigation that the taking was not under the right of eminent domain but was a tortious taking for which the respondent was liable as a tort feasor. The claim filed in the Court of Claims has not been and will not be prosecuted until the final determination of the present litigation and then only in the event that it is held in the present suit that the Government took as sovereign.

There is no rule which required the petitioner to make an election at that time at its own peril as to the legal character and effect of the act of the Government in seizing its property.

The cases cited at page 10 of the respondent's brief are not in point. The principle involved in those cases is stated in one of them as follows:

> "Where a party *gives a reason* for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." Our italics.
>
> *Railway Company* v. *McCarthy*, 96 U. S., 258, at pp. 267-268.

The case of *Smith* v. *Boston Elevated Railway Co.*, 184 Fed., 387, held that the plaintiff in a negligence case,

> "after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent, and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false."

The other cases are similarly without application. None of them lay down any rule which would prevent a party, situated as is the petitioner in the case at bar, from taking such a precautionary measure as the filing of the claim in the Court of Claims.

V.

The respondent's brief in suggesting that the Government is in no position to attempt to deny the rightfulness of the respondent's possession, since the respondent obtained possession from the Government as lessee, wholely overlooks the provisions of Insert E contained in the contract between the United States and the respondent, which expressly provided that the United States did not undertake to transfer title, did not guarantee peaceable possession, would not defend any action, and that nothing done with respect to the seizure of the petitioner's property should be made the basis of a claim against the United States (Record, p. 101; Report of Committee, fol. 87, also pp. 79-80). Under the terms of that agreement the respondent took all the risks of the situation, and as between the Government and the respondent it was clearly agreed that if it became necessary to pay the petitioner for the property, such payment was to be borne by the respondent.

VI.

The statement contained in respondent's brief, at page 8, that the case of *Tinker & Scott* v. *United States Fidelity & Guaranty Co.*, 169 Fed., 211, is in accord with the *Buffalo Pitts* case, is doubtless inadvertent. In the Tinker case the plaintiffs were the owners of certain property which was upon the site of Government work. The original contract was annuled and the surety of the original contractor completed the

contract. The Government seized certain of the plaintiffs' property and turned it over to the Surety Company to use in the completion of the work, in substantially the same way as was done in the case at bar. The plaintiff sued the Surety Company in trover as did the petitioner in the present case. The plaintiffs had entered into a written agreement, with the original contractor, by which plaintiffs stipulated that they would be bound by the terms of the original contract. It was held that under the terms of the contract to which they had expressly assented some of their property was rightfully taken by the Government as a matter of contractual right. *The remainder of the plaintiff's property, however,* was held not to be within the terms of the original contract, and as to such remaining property *the Court granted a recovery in conversion to the plaintiffs* against the Surety Company, holding that the Government had been without right under the contract to seize such property and that the possession of the Surety Company, the defendant, was wrongful. The Court said:

> "The government was without authority, under its contract with Prendergast & Clarkson (the original contractors) to take the rock into possession or to deliver the same over to the defendant. Therefore the defendant's possession thereof is wrongful as against the plaintiffs, and the latter are entitled to recover its value."
>
> *Tinker & Scott* v. *United States Fidelity & Guaranty Co.,* 169 Fed., 211, at p. 216.

The case is therefore a direct authority in favor of the petitioner in the present case.

Point IV of the respondent's brief shows the importance of the questions involved in the case at bar, both from the standpoint of the Government and from that of contractors and owners of property brought upon the site of Government work. The present state of the law is one of confusion which can only be cleared away by a decision of this Court. The case is therefore clearly one in which a writ of certiorari should issue.

VII.

The Government acted solely in pursuance of what it claimed to be its contractual rights under its contract with the Hubbard Building & Realty Company, to which the petitioner was not a party and by the terms of which it was not bound, as has been established by the courts below. The Government officers proceeded upon the theory that the Government could acquire title to the property in disregard of the petitioner's rights and without payment or compensation to petitioner. Such procedure and the theory on which it was based have been held to have been erroneous. This being so, then, as the Government clearly negatived by its acts and words any intention of taking the property in its sovereign capacity under the right of eminent domain, the acts of its officers were clearly tortious and the Government acquired no title. There should

therefore be a recovery for the petitioner as in the *Tinker & Scott* case, *supra*.

It is respectfully submitted that the petition should be granted and a writ of certiorari allowed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 227.

BALL ENGINEERING COMPANY, PETITIONER,

against

J. G. WHITE & CO., A CORPORATION, RESPONDENT.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF THE UNITED STATES AS AMICUS CURIAE.

STATEMENT.

Believing that the decision of the Court of Appeals in the case at bar to the effect that the United States is liable under the Tucker Act when property of a third person is taken by one of its agents under the circumstances disclosed in this record is based upon erroneous principles leading to results detrimental to the interests

of the Government, the United States joined in the petition for a writ of certiorari in the above entitled cause and now submits as *amicus curiae* the following brief of argument on its liability to the Ball Engineering Company under the facts shown in this record.

As a preliminary to the brief we wish to point out that the respondent, J. G. White & Co., with the knowledge that the plant and materials did not belong to the Hubbard Company, and had never belonged to the Hubbard Company, and after negotiations with the Ball Engineering Company for the rental or purchase from that company of said plant and materials had failed to result in agreement on a price, procured possession of petitioner's property with the assistance of a Government officer (upon conditions specifically exempting the Government from liability), and having procured possession of the property of the Ball Engineering Company on the site of the work, the White Company used that property in the completion of the lock and dam. Such action on the part of the respondent obviously amounted to conversion of the property of the Ball Engineering Company unless the United States in some way obtained the right to the property of the Ball Engineering Company on the site and transferred said right to the White Company.

The Circuit Court of Appeals, as well as the lower court, rejected the theory on which the Government and the respondent actually proceeded in seizing the petitioner's property and therefore the only way in which the respondent can escape liability for conversion is on the theory that the Government *did* acquire title to the property of the Ball Engineering Company under the right of eminent domain.

POINT I.

Where the case is not founded on the Constitution of the United States or a law thereof, or a regulation of an Executive Department, no recovery can be had if the case be one sounding in tort.

(*a.*) In United States *v.* Buffalo Pitts Co., 193 Fed. 905, 908, 909, the Court of Appeals analyzed Justice Brown's decision in Dooley's case, 182 U. S. 222, and his concurring opinion in United States *v.* Lynah, 188 U. S. 445, 474, and reached the following conclusion:

> "Accordingly we think the judgment below right, whether it rested on an implied contract of the Government to pay within the opinion of Mr. Justice Brewer in the Dooley Case or upon its constitutional obligation within the opinion of Mr. Justice Brown."

In its first decision of the case at bar, the Circuit Court of Appeals (223 Fed. 618, 620), said:

> "It (the Government) made no proprietary claim and therefore was bound to pay the real owner for the property, whether the taking was tortious or not."

(*b.*) It may be assumed that this statement of the law is correct, although it has never been adopted by this Court, but we deem it necessary as briefly as possible to consider the authorities.

(*c.*) It is true that in the Dooley Case, Justice Brown expressed the view that the limitation "cases not sounding in tort" in the Tucker Act applies only to actions for damages, so that a plaintiff can, as regards the United States, waive a tort and sue on the common counts; but

the remark was a mere dictum, for he concludes his opinion by holding (182 U. S. 228) that whether the importer could waive the tort and sue on an implied contract was immaterial as the case was one **founded on a law of Congress.** This is brought out by the most recent decision of this Court in this class of cases—United States *v.* Emery, 237 U. S. 28, 32—where the Court said:

> "However gradually the result may have been approached in earlier cases, it now has become accepted law that claims like the present are 'founded upon the revenue law.'"

It is further shown by the case of Russell *v.* United States, 182 U. S. 516, 530, 535 (a decision in the same volume as the Dooley Case, and in which Justice Brown joined), where the Court said:

> "This Court has held that under the Act of March 3, 1887, 24 Stat. 505, c. 539, defining claims of which the Court of Claims had jurisdiction, the Court had no jurisdiction of demands **against the United States** founded on torts. Schillinger *v.* United States, 155 U. S. 163; United States *v.* Berdan Fire-Arms Co., 156 U. S. 552. In other words, to give the Court of Claims jurisdiction the demand sued on must be founded on a convention between the parties—'a coming together of minds.'"

And again in conclusion (p. 535):

> "This doctrine may be technical. If the United States was a person, on the facts of this record (assuming, of course, the petition to be true), it could be sued as upon an implied contract, but it is the prerogative of a sovereign not to be sued at all without its consent or upon such causes of action as it chooses. It has not chosen to be sued

in an action sounding in tort, this Court has declared, as we have seen."

As to the Lynah case, it is true that Justice Brown repeated the remarks made by him in the Dooley Case (188 U. S. 475), but this repetition was likewise a dictum, for he held that the case, being one of a taking as a sovereign of private property for public uses, was founded on the Constitution of the United States, so that no implied contract was necessary. Even so limited, the majority of the Court did not agree with him, but placed the decision on the ground of an implied contract, and in Peabody *v.* United States, 231 U. S. 530 (which was either a case of taking under the power of eminent domain, or nothing), the Court said (231 U. S. 539):

> "The suit must rest upon contract, as the Government has not consented to be sued for torts, **even though committed by its officers in the discharge of their official duties * * *; and a contract to pay cannot be implied unless there has been an actual appropriation of property."**

(Citing among other cases Russell *v.* United States, *supra*). In the Peabody case the officers acted under authority of an Act of Congress.

However, we have no disposition to question the correctness of Justice Brown's views. We only desire to call the Court's attention to their limitations, and to the firm attitude of this Court from the beginning up to the present day on the position that no implied contract can be set up against the United States in a case sounding in tort.

(*d.*) The Russell case, *supra,* was followed in Harley's Case, 198 U. S. 229, where the Court excluded from the jurisdiction "those contracts **or obligations** that the law is said to imply from a tort" (198 U. S. 234). In Juragua Iron Co. *v.* United States, 212 U. S. 297, 309, Russell's and Harley's Cases are relied on where there was clearly a taking for public use. It was held that, even if the laws of war did not justify the taking, it was a mere tort and hence "a claim against the Government for **compensation** on account thereof would make a case "sounding in tort." (The action was one to recover the value of the property taken, without damages.) In Crozier *v.* Krupp, 224 U. S. 290, 303, 304, Russell's and Harley's Cases are again affirmed, and the rule is stated that in case of infringement of a patent,

> "* * * the power to sue the United Sattes for redress did not obtain unless from the proof it was established that a contract to pay could be implied—that is to say, that no right of action existed against the United States for a mere act of wrongdoing by its officers."

It was held that the United States by statute had now authorized the appropriation of such property as sovereign, and payment therefor. In United States *v.* Buffalo Pitts Co., 234 U. S. 228, 232, the Court again stated that there could be no recovery for acts merely tortious, repeated the distinction taken in the Lynah Case between the assertion of a proprietary and of a sovereign right, and placed its decision on the Act of Congress, and the Government's use of the claimant's property without disputing his title and without denying his right to compensation. In New Orleans-Belize S. S. Co. *v.* United States, 239 U. S. 202, 206, 207, the Court reaffirmed the

position taken in its prior decisions. Finally, in the case of Tempel *v.* United States, decided by this Court on December 9th, last, the whole matter was thoroughly considered again, and the various authorities analyzed. The conclusion of the Court was as follows:

> "The findings of fact made by the trial court (amplified by the reports of the Secretary of War, of which we take judicial notice) show that the Government claimed at the time of the alleged taking and now claims that it already possessed, when it made its excavation in 1909, the property right actually in question. It is unnecessary to determine whether this claim of the Government is well-founded. The mere fact that the Government then claimed and now claims title in itself and that it denies title in the plaintiff, prevents the Court from assuming jurisdiction of the controversy. *The law cannot imply a promise by the Government to pay for a right over, or interest in, land, which right or interest the Government claimed and claims it possessed before it utilized the same. If the Government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such, the Tucker Act affords no remedy. Hill v. United States*, 149 U. S. 593, which both in its pleadings and its facts bears a strong resemblance to the case at bar, is conclusive on this point. See also *Schillinger v. United States*, 155 U. S. 163. The case at bar is entirely unlike both the *Lynah* case and the *Cress* case. In neither of those cases does it appear that, at the time of taking, there was any claim by the Government of a right to invade the property in question without the payment of compensation. Under such circumstances it must be assumed that the Government intended to take and to make compensation for any property taken, so as to afford the basis for an implied promise. And

when the implied promise to pay has once arisen, a later denial by the Government (whether at the time of suit or otherwise) of its liability to make compensation does not destroy the right in contract and convert the act into a tort. In both of those cases the facts required the implication of a promise to pay. But here the Government has contended since the beginning of the improvement that, at the time of the dredging in 1899 and in 1909, it possessed the right of navigation over the land in question; which right of navigation, if it existed, gave it the right to dredge further in order to improve navigation. The facts preclude implying a promise to pay. If the Government is wrong in its contention, it has committed a tort. The United States has not conferred upon the District Court jurisdiction to determine such a controversy. See *Cramp & Sons v. Curtis Turbine Co.*, 246 U. S. 28, 40-41." (Italics ours.)

It therefore appears clearly and emphatically, from a long line of decisions of this Court, that unless the case is founded on the Constitution or on some law of the United States, no recovery can be had in a case sounding in tort.

POINT II.

The claim of the Ball Engineering Company against the United States, if any, does not arise under the Constitution, and, therefore, necessarily is a case sounding in tort.

(*a.*) There is no claim made that the case is founded on any law of the United States or any regulation of an Executive Department. It must, therefore, either be founded on the Constitution, or be on an implied contract or for damages. If, however, the United States did not

rightfully take possession of the property under the Constitution, it must have acted under the provisions of the contract with the Hubbard Company. Since, however, the Circuit Court of Appeals has decided that it had no such right under the Hubbard contract, its action or that of its officers must have been tortious, and the claim of the Ball Engineering Company against it, if any, must have been one sounding in tort, and not one on an implied contract.

(*b.*) The question is, therefore, whether the claim arose under the Constitution; that is, since the Fifth Amendment is the only provision of the Constitution claimed to be applicable, whether the United States took the property of the Ball Engineering Company for public use under the power of eminent domain.

We are not aware of any power in the officers of the United States to take property for public use in times of peace without the authority of an Act of Congress or of a regulation having the force of law (a condition which existed in the Buffalo Pitts Case, but does not exist here). Waiving this point, however, the Lynah Case, *supra*, has clearly stated the conditions under which the United States will or will not be held to have taken property under the Fifth Amendment, the statement was affirmed in the Buffalo Pitts Case, and is now placed beyond doubt by the decision in Tempel's Case, *supra*. Where the United States, not denying the title of the claimant, asserts its right to take his property by virtue of a paramount governmental right, it proceeds under the power of eminent domain. Where, however, it is not asserting a governmental right, but claims that its right to the possession or ownership of property is superior to that of the claimant by virtue of the ordinary

rules of private law, there it is not asserting its overriding right of sovereignty, and if its title be defective under the law it has invoked, its action is merely tortious and *damnum absque injuria*. Moreover, whether the United States was, in any particular case, asserting its sovereign right depends upon its intent as gathered from all the facts. As said in the Peabody Case, *supra* (231 U. S. 538, 539):

> "But, in this view, the question remains whether it satisfactorily appears that the servitude has been imposed; **that is, whether enough is shown to establish an intention on the part of the Government to impose it.**"

(*c*.) Applying these principles to the case at bar, the findings seem to be inconsistent with any other view than that the Government intended merely to assert a proprietary right arising out of the rules of private law, and had no notion of asserting a sovereign title, paramount to the admitted right of the claimant. This clearly appears, as it seems to us, from a comparison of finding 6 (Rec. 36)—made to conform to the decision of the Circuit Court of Appeals upon the first appeal—with the prior findings. There seems to be a complete *non sequitur*—a material gap which has not been bridged. All of the other findings are emphatic to the effect that the United States took possession of the property under the provisions of paragraph 33 of the Hubbard specifications and not otherwise. The answer of the White Company so alleged (Rec. 15), and all the evidence without any exception was to the same effect. The White Company requested the United States to proceed under this paragraph (Rec. 64), the United States had bound itself to do so at the White Company's request (Rec. 79), the Ball

Engineering Company was notified that the United States claimed the right under paragraph 33, and that it did not recognize any title in the Ball Engineering Company (Rec. 94, 95), the Hubbard Company was directly notified to the same effect (Rec. 101), and the Ball Engineering Company was warned that the United States, having taken physical possession under the terms of the Hubbard contract, would treat any attempt to remove the property as a trespass (Rec. 107). Nothing can be more certain, therefore, than that the United States intended to take possession, and did in fact take possession, under a claim of superior right arising out of the provisions of paragraph 33 of the Hubbard specifications. Apparently the Circuit Court of Appeals took the same view at the first hearing, for it said (223 Fed. 620):

> "It" (the United States) "professed to act under Section 33 of the contract with the Hubbard Company."

That Court surely cannot have meant to say that the United States was merely using paragraph 33 as a cloak while in reality intending to assert and in fact asserting its sovereign power of eminent domain; and just as surely that Court cannot have meant to hold that because the United States was wrong as to the validity of the right under which it acted, it must be taken to have acted under its sovereign right of eminent domain, whether it intended to or not, for such a holding would be directly contrary to the law as repeatedly laid down by this Court.

(*e.*) The decision of the Circuit Court of Appeals seems to rest upon the statement that, although the United States intended to act and did act under paragraph 33 of the Hubbard specifications, yet it did not

thereby make any proprietary claim. With great respect for the opinion of that Court, we are unable to understand what a "proprietary claim" would be, if this was not one. The claim of the United States fell and was intended to fall under the following formula: If A make a contract with X by which X agrees to erect a building for A, and the contract contain a provision that, on X's default with annulment of the contract, A shall have the right to take possession of all materials, etc., prepared for use or in use in the prosecution of the work and M, a subcontractor under X, bring materials, etc., on the *situs*, using them in the prosecution of the work, then A on annulment has the right to take possession of M's materials, etc., M for this purpose being merely X's agent (Rec. 95). Can there be any doubt that this was the consistent position of the United States? But this formula is one of private law and is applicable to private persons as much as to the United States. No claim was made that any statute gave the United States special rights, and the right of eminent domain was never even hinted at. All that it was intended to assert, and all that was in fact asserted was that under the general law of contracts and of agency the United States—like any private person in its situation—had a right to the possession of the materials. Such a claim is necessarily one of proprietary right—of a superior right of ownership or of possession under the rules of private law. Hence the possession, if not justified by those rules, was tortious, and no contract for compensation can be implied against the United States.

Respectfully submitted,

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